No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

7

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

BRIEF FOR APPELLEE.

DINKELSPIEL & DINKELSPIEL,
333 Montgomery Street, San Francisco,
Attorneys for Appellee.

File

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Page

Argument 6

I.

The statute of fraud has no application to the telegrams (Plaintiff's Exhibits 2 and 3) as a contract of sale of growing periodic crops 6

II.

The two telegrams (Plaintiff's Exhibits 2 and 3) constitute a memorandum of the agreement of the parties and satisfies the requirements of the statute of fraud............ 7

(a) Parol evidence is always admissible to remove apparent ambiguities or uncertainties from the face of a written contract to ascertain the identity of the subject matter and to explain the usage or meaning intended of trade terms........................... 7

(b) The telegrams in dispute (Plaintiff's Exhibits 2 and 3) when read in the light of the evidence show an absolute and unqualified acceptance by appellants of the offer of appellee............................. 11

(c) There was a clear and unequivocal meeting of minds of the parties as to the subject matter of the contract 14

(d) The telegrams as a contract were mutually binding on the parties 20

III.

Appellants are estopped to deny said telegrams (Plaintiff's Exhibits 2 and 3) constituted a binding contract........ 22

IV.

No variance exists between the proof and the pleadings, nor has the issue raised been saved for review by this court 22

V.

The motion for a directed verdict by appellants was properly denied 24

(a) Where a conflict of the evidence exists the issue is one of fact for the jury....................... 24

(b) Where a conflict of the evidence exists the judgment will not be disturbed by the appellate court......... 25

VI. Page

The damages awarded appellee by the jury have been sufficiently proved by the evidence, and such evidence was admissible in proof thereof.......................... 26

(a) Appellee's sales account (Plaintiff's Exhibit 8) was sufficient as proof of the amounts received for the sale of the asparagus, and constituted both a permanent record and original entry..................... 27

(b) Appellee's sales account (Plaintiff's Exhibit 8) is admissible in the evidence as proof of its contents as an itemized summary by express statutory permission 34

(c) There was competent evidence in the record showing the grade and market price of the asparagus sold by appellants' agents 36

Table of Authorities Cited

Cases Pages

American Sugar Refining Co. v. Holdin, etc., 286 Fed. 685 19

Baird Investment Co. v. Harris, 209 Fed. 291.............. 17
Blandon, The, 35 Fed. (2d) 933.......................... 38
Brenner v. Redlick Furniture Co., 113 Cal. App. 343...... 15
Brewer v. Horst & Lachmund, 127 Cal. 643............... 9, 21
Buessel v. United States, 258 Fed. 819.................... 19

California W. D. Co. v. Cal. M. O. Co., 178 Cal. 337....... 11
Chan Kiu Sing v. Gordon, 171 Cal. 28..................... 34
Chicago B. & Q. R. Co. v. Kelley, 74 Fed. (2d) 80........ 25
C. M. St. P. & P. R. Co. v. Linehan, 66 Fed. (2d) 373..... 25
Coates v. General Motors, 3 Cal. App. (2d) 340........... 16
Cole & Wharf Co. v. McWilliams Inc., 59 Fed. (2d) 979... 23

Dickinson v. Ohashi Importing Co., 61 Cal. App. 101...... 18
Diffendorf v. Pilcher, 116 Cal. App. 270.................10, 21

Edwards v. U. S., 7 Fed. (2d) 257........................ 19
Ellis v. Denver L. G. R. Co., 43 Pac. 457................. 21
Emeric v. Alvarado, 64 Cal. 529.......................... 22

Fleischmann Construction Company v. United States, 270 U. S. 349, 70 L. Ed. 624............................ 19

Globe Mfg. Co. v. Harvey, 185 Cal. 255.................. 35

Hamby v. Truitt, 81 S. E. 593............................ 17
Harris v. Vallee (Ga. App.), 116 S. E. 642............... 17
Hazelhurst Lumber Company v. Mercantile Lumber and Supply Co., 166 Fed. 191............................ 21
Hoff v. Lodi Canning Co., 51 Cal. App. 299.............. 13

Idol v. San Francisco Construction Co., 1 Cal. App. 92.... 30
Illinois Car & Equipment Co. v. Linstroth etc. Co., 112 Fed. 737 23
Illinois Power and Light Co. v. Hurley, 49 Fed. (2d) 681.. 25

Jackson v. United States, 297 Fed. 20.................... 23
Johnson v. Schimpf, 197 Cal. 43.........................10, 17

Landis v. Turner, 14 Cal. 573............................ 30

Pages
Mann v. Higgins, 83 Cal. 66 10
McPherson v. Milling Co., 44 Cal. App. 491 36
Moayan v. Moayan (Ky.), 72 S. W. 33 16

Nut House v. Pacific Oil Mills (Wash.), 172 Pac. 841 17

O'Connor v. West Sacramento Co., 189 Cal. 7 .... 11, 24

Patrick v. Tetzlaff, 46 Cal. App. 243 .... 31, 32
Payne v. Neuval, 155 Cal. 46 13
People v. Kawano, 38 Cal. App. 612 36
Philadelphia Storage Battery Co. v. Kelly-How-Thomas Co., 64 Fed. (2d) 843 25
Pilson v. Roedeffer et al., 61 Fed. (2d) 976 23
Preble v. Abrahams, 88 Cal. 245 .... 10, 21

Quivey v. Baker, 37 Cal. 465 7

Rice v. Eisner, 16 Fed. (2d) 359 38
Rohan v. Proctor, 61 Cal. App. 447 .... 8, 21
Roseville etc. v. Daniel (Ky.), 91 S. W. 691 34

Sanchez v. Yorba, 8 Cal. App. 490 10
Schuyler v. Pantages, 54 Cal. App. 83 16
Seymour v. Oelrich, 156 Cal. 782 11
Shea v. Sewage & Water Board (La.), 50 So. 166 36
Shields v. Rancho Buena Ventura, 187 Cal. 569 34
Storm & Butts v. Lipscomb, 117 Cal. App. 6 .... 30, 31, 34
Sugar Loaf O. & S. Co. v. Skewes, 47 Cal. App. 470 .... 31, 33

Tennant v. Wilde, 98 Cal. App. 437 10
Tipps v. Landers, 182 Cal. 771 31
Transmarine Corp. v. R. W. Kinney Co., 123 Cal. App. 411 22

United States v. Mid Continent Corp., 67 Fed. (2d) 37 38

Van DeMark v. California H. E. Assn., 43 Cal. App. 685 .. 16
Vulicevich v. Skinner, 77 Cal. 239 6

Weinburgh v. Gay, 27 Cal. App. 603 17
Wilson v. Alcatraz Asphalt Co., 142 Cal. 182 35

Codes

Civil Code, Section 1654 13
Code of Civil Procedure, Section 1724 6

Page
Code of Civil Procedure, Section 1855, subd. 5............ 34
Code of Civil Procedure, Section 1947.................... 31
28 U. S. C. A., Section 661.............................. 37

Texts

29 A. L. R. 1222.................................... 17
30 A. L. R. 1166.................................... 18
30 A. L. R. 1167, Division 3........................ 8
59 A. L. R. 1423, 1424, Division 3.................. 8

6 Cal. Jur. 307, Section 185......................... 14
8 Cal. Jur. 683, Section 2........................... 7
10 Cal. Jur. 465, Section 25......................... 22
12 Cal. Jur. 876, Section 32......................... 7
12 Cal. Jur. 899, 900, Section 63.................... 7
21 Cal. Jur. 263, Section 183........................ 23
21 Cal. Jur. 276, Section 93......................... 23
13 Corp. Jur. 283, Section 87-3...................... 14
13 Corp. Jur. 675, 676, Section 768-2................ 14
22 Corp. Jur. 188, Section 152-ee.................... 38
22 Corp. Jur. 929, Section 1135-d.................... 37

25 R. C. L. 648, Section 279......................... 16

No. 8412

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY ROTHSTEIN, M. H. ROTHSTEIN and I. ROTHSTEIN, individually and as copartners doing business under the firm name and style of H. Rothstein & Son (a copartnership),

Appellants,

vs.

GEORGE N. EDWARDS, as receiver in equity of Golden State Asparagus Company (a corporation),

Appellee.

BRIEF FOR APPELLEE.

The statement of facts as presented by appellants in their opening brief is not sufficiently full as to give the court a clear picture of the relationship and transactions between the parties. We shall endeavor to present the facts we deem essential and submit it as a supplement to those presented by appellants.

The appellee has been engaged in farming operations, particularly in growing asparagus for a period of about 20 years. (R. 18.) During the year of 1934,

the time in dispute and prior thereto, he was receiver in equity of the Golden State Asparagus Company, a corporation, whose principal business was and is asparagus farming with its lands located on Sherman, Brannan and Andrus Islands in the Delta region of Sacramento County. In February of 1934, he had as such receiver about 600 acres under cultivation in asparagus on Brannan Island. (R. 16, 17.) The witness, Krasnow, was an employee of appellants; it was his duty to find crops for appellants to purchase. (R. 95.) At Krasnow's request appellee met Rothstein at Isleton, Sacramento County, about February 10, 1934; Rothstein wanted to purchase appellee's asparagus crop then growing on Brannan Island. The appellee, Edwards, told him he was not particularly anxious to sell as he had about completed arrangements to ship his crop. Rothstein remarked he usually got what he wanted, and appellee told him that if he met his terms he could get the asparagus. They discussed the details and arrived at a satisfactory understanding save as to price. Edwards asked Rothstein $2.00 per crate f. o. b. Isleton for his entire crop of bunch asparagus shipped to April 10, 1934, and Rothstein wanted a few days to think it over; Edwards gave him 48 hours to accept or decline the price, since the crop was fast ripening. Rothstein then went to Seattle.

At the meeting between Edwards and Rothstein at Isleton Edwards told him that if he sold him his asparagus he would have to have a satisfactory bank guarantee to assure payment would be made for all asparagus that was shipped upon delivery of documents, to which Rothstein agreed; Edwards stated

he was acting as receiver and could take no responsibility on that score. (R. 17, 18.)

Rothstein told him the asparagus was to be shipped to the Eastern market—Atlantic Seaboard; Edwards told him he would ship him the same quality of asparagus that was shipped him through Garin in 1931; Rothstein said it was the quality he wanted; the asparagus shipped Rothstein in 1931 was bunch shipping asparagus. As far as Edwards knew no other kind of asparagus was shipped to the Eastern market. He told Rothstein he wanted 5¢ a pound for shipping asparagus—bunch asparagus—$1.50 per crate plus 50¢ for bunching, packing and loading on the cars at Isleton. (R. 26, 27.)

The green shipping or bunch asparagus season begins about the middle of February ordinarily and lasts until the first to the tenth of April; the canning period begins ordinarily on the tenth day of April. (R. 39, 40.)

Shipping asparagus and bunch asparagus are the same thing, and no other asparagus is shipped East. (R. 35.) Under the agreement at Isleton bunch asparagus was to be shipped during the green asparagus season up to April 10, 1934; that appellee was to do the bunching and packing; the only asparagus appellee had was on Brannan Island; he told Rothstein that the only asparagus he had was on Brannan Island. (R. 35, 37, 42, 43.) Krasnow saw the asparagus on Brannan Island (R. 45), and Rothstein knew where it was raised and produced. (R. 99.) Rothstein was interested in shipping asparagus—bunch asparagus. (R. 95, 99.)

After the meeting at Isleton Krasnow phoned Edwards and told him Rothstein would accept his offer, pay the price, and make satisfactory bank arrangements and told him to wire Rothstein at Seattle, confirming the sale, which he did. (R. 19.)

As a result of the request of Krasnow, Edwards on February 12, 1934, sent the following telegram to Rothstein at the Athletic Club, Seattle, Washington:

> "Will confirm sale to H. Rothstein and Son all asparagus shipped from Golden State Asparagus Co. up to and including Apr 10 34 $2 per crate fob cars Isleton providing satisfactory bank guarantee is given immediately that all drafts against shipments will be paid wire answer 801 Jones Avenue Oakland
>
> Geo N Edwards Receiver
> Golden State Asp. Co."

(Plaintiff's Exhibit No. 2.)

On February 13, 1934, Edwards received the following telegram in reply which was addressed to the Golden State Asparagus Company, 801 Jones Avenue, Oakland, California, and reads:

> "Answering will arrange guarantee payments all bunch asparagus price mentioned expect return San Francisco last this week or first next week don't worry when we make deal with you will go through with same can draw up contract my arrival meantime figuring deal confirmed.
>
> M. H. Rothstein."

(Plaintiff's Exhibit No. 3.)

On February 19th, Rothstein, Krasnow, Edwards and Dinkelspiel met in Mr. Dinkelspiel's office. Upon

their arrival Rothstein said "what are we here for? We got a deal. What are we going to discuss?". (R. 112.) He told Rothstein he wanted to arrange the bank guarantee which Rothstein promised to give; Rothstein asked him what his idea was; he replied he estimated there would be 20,000 crates of bunch asparagus which would involve about $40,000.00 and demanded an irrevocable letter of credit for $40,000.00 or Rothstein's Philadelphia bank could guarantee payment of drafts as presented. Rothstein refused, stating his bank would think he was crazy if he asked for a $40,000.00 letter of credit. Rothstein refused to put up any security whatever other than the ordinary credit of his company, and indicated the deal was off if the appellee could not deal with him on that basis; he refused to put up any guarantee whatever (R. 23, 112) and stated that he had bought millions of dollars worth of produce all over the United States and did it largely over the telephone or by telegraph and that if Edwards was not willing to accept his credit he would call the deal off. (R. 40.)

The terms "bunch grass" and "green shipping grass" as used by the trade are synonymous; that you pay for bunch asparagus; the culls are used locally; you can't afford to ship them; the value is so low (R. 40, 41); that the field run of asparagus means everything in the field; you subtract bunch pack and everything left is culls. (R. 64.)

As a result of the refusal to put up security the contract was not consummated, and the shipping asparagus or bunch asparagus which would have gone to appellants had the contract been consummated was

consigned through one Roper, a produce broker, to Eastern agents. The number of crates of shipping asparagus produced from Brannan Island was 15,161 crates which sold for $22,547.85. Had appellants fulfilled their contract the asparagus would have brought at $2.00 per crate the sum of $30,322.00. It was stipulated that the prayer of the complaint be reduced to $7604.02. The jury found certain railroad claims for damaged shipments amounted to $100.00. The jury found the damages to be the sum of $7502.02, which is the difference between $22,547.00 plus $100.00 and $30,322.00 or $7502.02.

ARGUMENT.

I.

THE STATUTE OF FRAUD HAS NO APPLICATION TO THE TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) AS A CONTRACT OF SALE OF GROWING PERIODIC CROPS.

Growing crops—*fructus industriales*—are not goods or chattels within the meaning of the statute of fraud (C. C. P. Section 1724) and pass by verbal contract of sale.

> *Vulicevich v. Skinner,* 77 Cal. 239, at page 240:
> "We cannot concur with this view. 'Contracts for the sale of growing periodical crops—fructus industriales—are not within the statute of frauds, and therefore need not be made in writing. After some vacillation, this has become the settled doctrine.' (Marshall v. Ferguson, 23 Cal. 65; Davis v. McFarlane, 37 Cal. 636; 99 Am. Dec. 340.)"

12 *Cal. Jur.* page 876, Section 32:

"Growing crops are not chattels within the meaning of this provision of the Statute, and pass by verbal sale."

See also:

Quivey v. Baker, 37 Cal. 465;
8 *Cal. Jur.* page 683, Section 2.

Even if the court should find that contracts involving the sale of growing crops are governed by the statute of fraud still it is the contention of appellee that said telegrams constitute a good and sufficient memorandum within the meaning of the statute of fraud. This brings us to that issue.

II.

THE TWO TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) CONSTITUTE A MEMORANDUM OF THE AGREEMENT OF THE PARTIES AND SATISFIES THE REQUIREMENTS OF THE STATUTE OF FRAUD.

No particular form in writing is necessary to remove a contract from the bar of the statute of fraud. Such contracts may be composed of letters or telegrams.

12 Cal. Jur. pages 899, 900, Section 63.

(a) Parol evidence is always admissible to remove apparent ambiguities or uncertainties from the face of a written contract to ascertain the identity of the subject matter and to explain the usage or meaning intended of trade terms.

While as a general rule the memorandum must contain the essentials of a contract, save those supplied

by implication of law, these essentials need not be set forth with such particularity as to foreclose any resort to parol evidence to ascertain the intention of the parties as to the identity of the subject matter where ambiguous or uncertain, or the meaning of trade terms employed in a contract where such trade terms are unknown to laymen; that while essentials of which the contract is silent may not be supplied by parol evidence, a resort to such evidence may be made to explain essentials which are uncertainly or ambiguously expressed.

59 *A. L. R.* pages 1423, 1424, Division 3;
30 *A. L. R.* page 1167, Division 3.

It simply involves the application of the maxim which substantially holds that to be certain which can be made certain. Thus, in *Rohan v. Proctor,* 61 Cal. App. 447 at page 455 it was said:

> "In order to the validity of the written agreement for a lease it must either be in itself certain as to the kind and character of the improvements to be made upon the premises, the completion of which would fix the beginning of the term, *or it must be susceptible of being made certain by oral evidence showing the prior or contemporaneous understanding of the parties in that regard.* But if the parties have come to no such understanding at the time the written agreement is made, the uncertainty of the writing in that regard is fatal, since it is an uncertainty in a respect essential to its validity which no amount of oral evidence as to a later understanding could remove. The effect of such evidence would merely be to create an additional oral agreement touching a

vital and omitted essential of the writing and thus render the entire contract between the parties oral and hence of necessity obnoxious to the statute of frauds." (Italics ours.)

It will be noted that the telegrams in dispute point to and confirm a prior verbal understanding.

Again, in *Brewer v. Horst & Lachmund,* 127 Cal. 643, at pages 646 and 647:

> "The only question presented for decision is, Did these telegrams constitute a sufficient note or memorandum of the contract to satisfy the requirements of the Statute of Frauds? The trial court, by its judgment, answered this question in the affirmative. And, in view of all the facts found, we think the court reached the proper conclusion. If there were nothing to look to but the telegrams, the court might find it difficult, if not impossible, to determine the nature of the contract, or that any contract was entered into between the parties. But the court is permitted to interpret the memorandum (consisting of the two telegrams) by the light of all the circumstances under which it was made; and, if, when the court is put into possession of all the knowledge which the parties to the transaction had at the time, it can be plainly seen from the memorandum who the parties to the contract were, what the subject of the contract was, and what were its terms, then the court should not hesitate to hold the memorandum sufficient. Oral evidence may be received to show in what sense figures or abbreviations were used; and their meaning may be explained as it was understood between the parties. (Mann v. Higgins, 83 Cal. 66; Berry v. Kowalsky, 95 Cal.

134; 29 Am. St. Rep. 101; Callahan v. Stanley, 57 Cal. 476.) Also: *'Parol evidence is always admissible to explain the surrounding circumstances, and situation and relations of the parties, at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter, and to explain all terms and phrases used in a local or special sense'.*" (Italics ours.)

It will be observed in point of fact both cases have peculiar application to the case before the court.

Again, in *Tennant v. Wilde,* 98 Cal. App. 437, at page 445:

> "For the purpose of determining what the parties intended by the language used, it is competent to show not only the circumstances under which the contract was made but also to prove that the parties intended and understood the language in the sense contended for; and for that purpose the conversation between, and declarations of, the parties during the negotiations at and before the time of the execution of the contract may be shown."

See also:

Johnson v. Schimpf, 197 Cal. 43;
Preble v. Abrahams, 88 Cal. 245, 250-251;
Mann v. Higgins, 83 Cal. 66, 68-69;
Diffendorf v. Pilcher, 116 Cal. App. 270, 272;
Sanchez v. Yorba, 8 Cal. App. 490.

And where, as to certain of its terms, a written contract is ambiguous or uncertain as to the meaning intended by the parties, or as to the meaning or usage

of trade terms employed, and where parol evidence as to such facts and circumstances are disputed, they become questions of fact for the jury.

> *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 18;
>
> *California W. D. Co. v. Cal. M. O. Co.*, 178 Cal. 337, 343.

Seymour v. Oelrich, 156 Cal. 782, cited by appellants, lacks point. There the plaintiff sought to supply essential terms and provisions on which the alleged contract was absolutely silent.

(b) The telegrams in dispute (Plaintiff's Exhibits 2 and 3) when read in the light of the evidence show an absolute and unqualified acceptance by appellants of the offer of appellee.

The phrase used by appellee in his telegram (Plaintiff's Exhibit 2) with relation to the subject matter of the contract is *"all asparagus shipped"* and not merely *"all asparagus"*. The phrase *"all asparagus shipped"* means and meant to the parties *"all shipping asparagus"* and *"shipping asparagus"* and *"bunch asparagus"* are one and the same thing in the usage and parlance of the asparagus trade as shown by the evidence and as found by the jury.

In this connection appellee testified: He told Rothstein at Isleton that he would ship him the same kind he shipped through Garin, bunch—shipping asparagus; that as far as he knew no other was shipped East; Rothstein said it was to be shipped to the Eastern market. (R. 26.) Appellee meant all shipping asparagus in the telegram; "shipping asparagus" and "bunch asparagus" are practically the same thing;

"shipping asparagus" or "bunch asparagus" is all that is shipped back East; culls are not shipped East, the value is too low. (R. 35, 41.)

Garin, a witness called by appellants, testified: Green merchantable shipping asparagus would be the same as bunch asparagus. (R. 49.)

Markham, a witness called by appellants, testified: Shipping asparagus is asparagus suitable for Eastern shipment; the words "field run" mean everything in the field. You subtract "bunch pack" in the field and everything left is culls. (R. 63, 64.)

While Rothstein testified: He wanted bunch asparagus; he was interested in "shipping asparagus"; that there is no difference between "all shipping asparagus" and "all green shipping asparagus". (R. 40, 75, 86, 95, 101.) That when you buy a grower's entire crop of "bunch asparagus" you do not specify so many crates of colossal and so many crates of this and that (R. 97); that the asparagus he buys goes principally to the Eastern seaboard; that he does not sell in the local market. (R. 100.) By drawing into the dispute, the various grades of bunch or shipping asparagus, such as colossal, jumbo, extra fancy, etc., serves simply to confuse the issues. They are not material, since the entire crop of bunch or shipping asparagus was sold regardless of grades. (R. 44, 97.)

Again, aside from the testimony it is admitted by appellants that the offer contained in appellee's telegram was to sell appellants *"all shipping asparagus"*. (Appellant's Assignment of Error 34, R. 225-226.)

Again, appellants telegram of acceptance (Plaintiff's Exhibit 3) contains the following: "* * * *Meanwhile figuring deal confirmed*". This confirmation is an unqualified acceptance showing that the minds of the parties had met; to contend otherwise appellants blow hot and cold.

The contention of appellants that there is no proof that the phrase "satisfactory bank guarantee" in appellee's telegram (Plaintiff's Exhibit 2) and the phrase "will arrange guarantee" contained in appellants' telegram of acceptance (Plaintiff's Exhibit 3) have *not* the same meaning, and that the burden to prove the same meaning was intended is on appellee, is entirely without merit. The one phrase is not contradictory or inconsistent with the other. The phrase employed by appellants is simply more comprehensive and general and includes within its terminology the phrase used by appellee. It may be reasonably construed as arranging the guarantee demanded.

If the phrase used by appellants as to the guarantee is ambiguous and susceptible of two interpretations, one in favor of appellee and the other opposed, the one favorable to the appellee will be adopted since appellants caused the ambiguity or uncertainty. Such uncertainties and ambiguities are to be interpreted most strongly against the one who prepared the instrument and caused the uncertainties to exist. The instrument in dispute was prepared by Rothstein.

Civil Code of California, Section 1654;
Payne v. Neuval, 155 Cal. 46;
Hoff v. Lodi Canning Co., 51 Cal. App. 299;

6 *Cal. Jur.* page 307, Section 185;
13 *Corp. Jur.* page 283, Section 87-3.

In 6 *Cal. Jur.* supra, at the place indicated, it was said:

> "Any uncertainties existing in an agreement are to be interpreted most strongly against one who prepared the instrument and caused the uncertainties to be present."

(c) There was a clear and unequivocal meeting of minds of the parties as to the subject matter of the contract.

The contrary contention of appellants, we believe, has been fully answered in the preceding subdivision. Complaint, however, is made that it does not appear in amount as to what would constitute a satisfactory bank guarantee, or the amount of asparagus which would be shipped without resort to parol proof. Aside from the estimate of 20,000 crates of bunch or shipping asparagus estimated by the parties (R. 113), the matter is not one for subsequent settlement or agreement. The agreement to furnish a satisfactory bank guarantee means one satisfactory to appellee who is the sole judge, the only limitation is that he act in good faith.

Thus in 13 *Corp. Jur.* Section 768-2 at pages 675 and 676, it was said:

> "Contracts in which one party agrees to perform to the satisfaction of the other are ordinarily divided into two classes: (1) Where fancy, taste sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility. *In contracts in-*

volving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision, and a court or jury cannot say that such party should have been satisfied where he asserts that he is not. The rule also applies to a contract providing that security for its performance shall be satisfactory." (Italics ours.)

Again, in *Brenner v. Redlick Furniture Co.,* 113 Cal. App. 343, at pages 346 and 347:

"Upon oral argument counsel for appellant further pointed out that contracts under which a party agrees to perform to the satisfaction of another fall into two classes: First, where fancy, taste or judgment is involved (Tiffany v. Pacific Sewer Pipe Co. 180 Cal. 700 (6 A. L. R. 1493, 182 Pac. 428); second, where the question is merely one of operative fitness or mechanical utility. (Thomas Haverty Co. v. Jones, 185 Cal. 285 (197 Pac. 105); Bruner v. Hegyi, 42 Cal. App. 97 (183 Pac. 369).) It is contended by appellant that the present case falls within the second class, in which dissatisfaction is no defense where the other party performs in a reasonably satisfactory manner or, in other words, in a manner which would be satisfactory to a reasonable man. A review of the authorities leads us to the conclusion that this case falls within the first class above mentioned and that it was a sufficient defense in the absence of bad faith to show that respondent was in fact dissatisfied. No suggestion of bad faith has been made."

See also:

Coates v. General Motors, 3 Cal. App. (2d) 340, 347;

Schuyler v. Pantages, 54 Cal. App. 83, 85;

Van DEMark v. California H. E. Assn., 43 Cal. App. 685.

Nor is the amount of the asparagus sold open to future agreement. It is definitely all "bunch" or "shipping" asparagus grown and harvested on Brannan Island for the 1934 green shipping asparagus season which ends April 10, 1934. That is certain which can be made certain. Absolute certainty will be secured upon harvest.

In this connection *Moayan v. Moayan* (Ky.), 72 S. W. 33, the headnote supported by the decision reads:

> "A contract to convey a third of all one's estate, of whatever nature, acquired by him, under his mother's Will; or otherwise acquired and now owned by him sufficiently describes the property, as it may be identified by parol evidence, to satisfy the Statute of Frauds."

Again, in 25 *R. C. L.* Section 279, page 648, it was said:

> "While the designation of the goods sold cannot be left entirely to parol proof, a description thereof is not necessarily insufficient because on its face it may be too general or indefinite to be applied to any particular property. In such a case the situation of the parties and the surrounding circumstances at the time of the sale may be shown to apply to the contract, to the subject matter, and if where so applied the subject matter may be established with reasonable certainty it is sufficient."

Again, in *Johnson v. Schimpf,* 197 Cal. 43, at page 48:

> "The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject matter of the contract."

See also, authorities cited supra, subdivision (a).

Neither *Weinburgh v. Gay,* 27 Cal. App. 603, nor *Baird Investment Co. v. Harris,* 209 Fed. 291, are in point. Both involve terms and provisions left open to future agreement of the parties. That none were left open in the case *sub judice* we point to the confirmation of the deal by appellants. No useful purpose can be achieved by an analysis of all the cases cited by appellants; in each of them either essentials were entirely omitted or left open to future agreement. However, we might state that in *Hamby v. Truitt,* 81 S. E. 593, quoted by appellants, the missing element was the weight of the bales and no evidence was introduced showing custom or usage as to weight. If a standard weight by custom or usage existed parol evidence thereof would have been admissible.

Harris v. Vallee (Ga. App.), 116 S. E. 642;
Nut House v. Pacific Oil Mills (Wash.), 172 Pac. 841;
29 *A. L. R.* 1222.

And as to price where left blank in the contract, the payment of the reasonable value thereof is implied.

> *Dickinson v. Ohashi Importing Co.*, 61 Cal. App. 101;
> 30 *A. L. R.* 1166.

The complaint that testimony was erroneously admitted over the objection and exception of appellants as to the sense in which the phrase "satisfactory bank guarantee" was understood by the parties before and after the exchange of the telegrams is also without merit. Appellants denied an unqualified acceptance with relation to the character of the guarantee to be furnished by the phrases employed in the telegrams, and the court apparently believed an ambiguity or uncertainty was present, hence a proper resort to the negotiations and surrounding circumstances, the demand for a satisfactory bank guarantee by appellee and the promise to furnish one by Rothstein at the Isleton meeting. (R. 18.) Again, upon demand for fulfillment at Mr. Dinkelspiel's office appellee was bound to name the amount and character of it. Again, if error, it was harmless since appellee was the sole judge as to what would constitute a satisfactory bank guarantee.

Moreover, it was appellants who first sought to define the phrase "satisfactory bank guarantee" and its use in the asparagus trade. (R. 46-47, 50-63.)

And finally, the admission of this testimony was not assigned as error and is not properly before this court for review.

Nor was the objection to the testimony of appellee as to his opinion with relation to the meaning intended by the use of the phrase "all asparagus shipped" in his telegram or as to the binding force of the contract well taken, since it involves a state of mind. However, if it be error it is harmless and unprejudicial to appellants. Moreover, no exception was taken to this testimony (R. 22) and consequently was not saved for review.

> *Edwards v. U. S.,* 7 Fed. (2d) 257, 358;
> *Fleischmann Construction Company v. United States,* 270 U. S. 349, 70 L. Ed. 624;
> *Buessel v. United States,* 258 Fed. 819.

And finally, Rothstein was permitted in his direct examination to give his interpretation of appellee's telegram (Plaintiff's Exhibit 2) and as to what he meant by the use of the clause "don't worry when we make deal with you will go through with same". (Plaintiff's Exhibit 3.) He was also permitted in direct examination over the objection and exception of appellee to testify he did not consider himself bound by his telegram. (R. 85, 86.)

Nor is there merit to the contention parol evidence is not admissible to show the meaning intended by the parties to the use of words used in the writing, which are otherwise uncertain. The contrary rule is recognized in *American Sugar Refining Co. v. Holdin, etc.,* 286 Fed. 685, cited by appellants. (See also authorities supra.)

Nor is there any merit to the contention appellee did not rely on the telegrams as a contract, but on the

oral contract at Isleton, having instructed Mr. Dinkelspiel to draw up a contract in accordance with the arrangements at Isleton. Edwards testified the agreement at Isleton was embodied in the telegrams and that he gave Dinkelspiel the two telegrams and suggested he draw up a contract in conformity with the telegrams as a convenient memorial. (R. 30, 31.)

(d) The telegrams as a contract were mutually binding on the parties.

It is argued the contract lacked mutuality since the use of the phrase "all asparagus shipped" imposed no obligation to ship any asparagus. Appellants ask how much asparagus was appellee bound to ship during the term specified? Our reply is all the shipping or bunch asparagus grown on Brannan Island which is subject to exact admeasurement upon harvest during the period agreed, the green asparagus season. The appellee had under cultivation 600 acres of asparagus on Brannan Island. At Isleton they discussed the kind of asparagus to be shipped (R. 16-19); no other is shipped East. At Isleton Rothstein was told the only asparagus appellee grew was on Brannan Island. (R. 42.) Rothstein was familiar with the region and knew where the asparagus was raised and produced. (R. 95, 99.) There was a full understanding between the parties save the price which appellee gave Rothstein 48 hours to consider. The offer made to Rothstein at Isleton was confirmed by telegram and accepted in the same manner. It has been heretofore shown that appellants were not in doubt as to the amount or kind of asparagus purchased (Assignment of Error 34,

R. 225-226); or the binding force of the telegrams as a compact or contract by express confirmation thereof. Plainly, there is no merit to this objection.

The case of *Hazelhurst Lumber Company v. Mercantile Lumber and Supply Co.,* 166 Fed. 191, quoted by appellants lacks application. In that case the defendant agreed to purchase all ties plaintiff could produce and ship, which is quite different than selling a growing crop of produce, the amount of which can be reduced to a certainty. A similar objection applies to *Ellis v. Denver L. G. R. Co.,* 43 Pac. 457. In that case there was no way to determine the amount of the various grades purchased. In neither of them was there any prior understanding. Where, however, a prior oral understanding exists resort may be had thereto to identify the subject matter where it is referred to in the memorandum.

Brewer v. Horst & Lachmund Co., supra;
Preble v. Abrahams, supra;
Diffendrof v. Pilcher, 116 Cal. App. 270, 272;
Rohan v. Proctor, supra.

In the case last cited the court turned to a prior oral understanding to determine the extent and character of the alterations and additions the lessor agreed to make, which was only generally referred to in the memorandum of the agreement to lease. The court indicated that in the absence of the prior oral understanding the memorandum would have come within the bar of the statute of fraud.

No useful purpose can be achieved by answering subdivision IV of Division I of appellants' brief, to

the effect that the writings disclosed a counter-offer. It would simply involve repetition. The contention has already been fully answered to the effect that there was a binding offer and acceptance by the parties by force of said telegrams.

III.

APPELLANTS ARE ESTOPPED TO DENY SAID TELEGRAMS (PLAINTIFF'S EXHIBITS 2 AND 3) CONSTITUTED A BINDING CONTRACT.

The acceptance or confirmation by appellants in their telegram of the offer or confirmation of sale contained in appellee's telegram, having been absolute and unqualified they may not now be heard to repudiate or deny it. They are estopped by the application of the maxim, "that one cannot blow hot and cold".

> 10 *Cal. Jur.* page 465, Section 25;
> *Emeric v. Alvarado,* 64 Cal. 529;
> *Transmarine Corp. v. R. W. Kinney Co.,* 123 Cal. App. 411, 424-425.

IV.

NO VARIANCE EXISTS BETWEEN THE PROOF AND THE PLEADINGS, NOR HAS THE ISSUE RAISED BEEN SAVED FOR REVIEW BY THIS COURT.

We are unable to find any objection or exception in the record to the admission of the telegrams (Plaintiff's Exhibits 2 and 3) in the evidence upon the ground of variance and the error assigned (Assign-

ment of Error 4, R. 213) and referred to does not raise the point hence, there is no issue of variance before this court. Not only must the ground of variance be urged in the trial court by proper objection and exception, but it must specify in what the variance consists.

Illinois Car & Equipment Co. v. Linstroth etc. Co., 112 Fed. 737.

Nor will the court consider questions not raised by assignment of error.

Cole & Wharf Co. v. McWilliams Inc., 59 Fed. (2d) 979, 981;

Pilson v. Roedeffer et al., 61 Fed. (2d) 976.

Again, if a variance did exist it is immaterial, since it does not appear, nor is it claimed by appellants that they were surprised or misled. In the absence of prejudice in this regard a variance cannot be considered material or substantial.

21 *Cal. Jur.* page 263, Section 183.

"A material variance is one which has misled the adverse party to his prejudice in maintaining his action or defense on the merits."

On page 276, Section 93, it was said:

"As a general rule, a variance between pleadings and proofs might have been obviated by amendment is deemed waived, unless properly objected to at the trial."

See also:

Jackson v. United States, 297 Fed. 20.

However, no variance exists between the proof and pleadings. It has already been shown that the parties

fully understood each other in all respects by the exchange of said telegrams and with the aid of parol evidence properly admitted in the evidence. To again point to such proof is to indulge in repetition.

V.

THE MOTION FOR A DIRECTED VERDICT BY APPELLANTS WAS PROPERLY DENIED.

(a) **Where a conflict of the evidence exists the issue is one of fact for the jury.**

This rule applies to conflicts of parol evidence introduced to remove ambiguities and uncertainties in written contracts, and where they exist as to the usage of trade terms in such contracts. This applies with peculiar force to the conflicting evidence introduced to remove the ambiguities and uncertainties on the face of the telegrams, and to explain the usage of trade terms employed.

> *O'Connor v. West Sacramento Co.*, 189 Cal. 7 at page 18:
>
> "If the facts and circumstances to be considered in the interpretation of the contract are undisputed, there is nothing to submit to the jury and the court must direct a verdict in accordance with the construction placed on the contract by the court in the light of the admitted circumstances. *On the other hand, if such circumstances are in dispute and the meaning of the contract is to be determined one way according to one view of the facts and another way in accordance with the other view of the facts, then the determination of the disputed fact must be left to the jury,* but

in no case can the proper construction of the contract be left to a jury. (California W. D. Co. v. California M. O. Co. 178 Cal. 337, 341 (177 Pac. 849).)" (Italics ours.)

(b) Where a conflict of the evidence exists the judgment will not be disturbed by the Appellate Court.

Illinois Power and Light Co. v. Hurley, 49 Fed. (2d) 681;

Philadelphia Storage Battery Co. v. Kelly-How-Thomas Co., 64 Fed. (2d) 843;

C. M. St. P. & P. R. Co. v. Linehan, 66 Fed. (2d) 373.

Indeed, the reviewing court does not weigh the evidence. It simply ascertains if there is substantial evidence in support of the verdict. In considering such evidence the testimony of appellee must be accepted as true, and appellee is entitled to all favorable inferences reasonably drawn from such evidence.

Chicago B. & Q. R. Co. v. Kelley, 74 Fed. (2d) 80, 82.

It is said the court labored under a misapprehension as to the law applicable to facts, and an instruction by the court (R. 183) is pointed to as an illustration. The instruction in question, in view of the others, given by the court, does not merit the construction given it by appellants. However, no point is made that it constituted substantial error, in view of which we shall not give it further consideration, other than to say that it has not been saved for review by this court because no specific objection or exception has been taken, nor has it been assigned as error.

VI.

THE DAMAGES AWARDED APPELLEE BY THE JURY HAVE BEEN SUFFICIENTLY PROVED BY THE EVIDENCE, AND SUCH EVIDENCE WAS ADMISSIBLE IN PROOF THEREOF.

It is contended by appellants that there has been a failure of proof as to damages and that the court erred in admitting appellee's sales account (Plaintiff's Exhibit 8, R. 142-151) over the objection and exception of appellants; that the court also committed error in admitting in the evidence "The Federal Market News" (Plaintiff's Exhibit 9, R. 169-172) over the objection and exception of appellants. The bulletin set forth in the record is simply a specimen copy, the balance of the exhibit being omitted in the interest of economy.

Inasmuch as the assignments of error relating to the introduction of Plaintiff's Exhibit 8 (Assignments of Error Nos. 8, R. 214; 37, R. 226; 14, R. 215) and assignment of error relating to Plaintiff's Exhibit 9 (Assignment of Error No. 15, R. 216) violate Rules 11 and 24 of this court for the failure to set forth the grounds of objection and exception urged at the trial, they are not properly before this court for review. Aside from this question, however, there is no merit to the objections and exceptions taken to the admission in the evidence of either said sales account, or the "Federal Market News". The objections to the introduction of the sales account were that it was hearsay, and not a permanent record (R. 137, 141); and the reasons are in substance as follows:

1. That said sales account (Plaintiff's Exhibit 8) did not show the total amount of monies received by appellee for the *sale* of said asparagus.

2. That said sales account is not a permanent record of the monies received from the *sale* of said asparagus.

3. That said sales account was prepared from figures and data not within the knowledge of appellee.

4. That said sales account did not show the price for which it was sold, nor the grades sold.

The specific objections assigned to the introduction of the "Federal Market News" (Plaintiff's Exhibit 9) are that they were not the best evidence since they were not certified documents. (R. 154.)

We shall now direct our attention to the objections taken to the introduction of the sales account (Plaintiff's Exhibit 8) as evidence, and its value in proof of damages.

(a) Appellee's sales account (Plaintiff's Exhibit 8) was sufficient as proof of the amounts received for the sale of the asparagus, and constituted both a permanent record and original entry.

This sales account was kept in a loose-leaf folder by the appellee personally. (R. 141.) It was his permanent record of sales made by his agents for asparagus shipped during the season of 1934; the entries are in his handwriting made at the times the asparagus was shipped and at the times he received payment covering each shipment; they are regularly kept from day to day; the asparagus is shipped through Roper, his agent, who notified him each day as shipments were made; when the selling agents sold the goods he was

rendered an account of sales showing the amount of money obtained for individual shipments; when the goods are sold in the East an account is made up which contains the same car number Roper gave him when the shipment was made; the number of crates and grades sold, and the price; the agent deducts the freight, the commission earned or any charges he pays out on the other end and sends him a check together with the account of sales; Roper consigned the asparagus to the different agents in the East; the sales reports he receives from the different agents he also keeps as a permanent record; all original communications are kept; he calls his sales account his 1934 asparagus sales; after these entries are made they are turned over to his bookkeeper who enters them in the cash book. (R. 134-139.)

A small amount was received from the railroad company the following year covering damages to asparagus during shipment, which was turned over to his bookkeeper and entered in the books. It would amount to forty or fifty dollars. Since he has been receiver for the Golden State Asparagus Company to the best of his recollection the annual recovery from railroad claims would not exceed $100.00; in prior years the volume or amount of shipments were greater than in 1934. (R. 163, 164, 166.) The jury found the amount to be $100.00. The evidence was sufficient from which the jury could base a finding as to the loss covered by the railroad claims. Again, no point is made by defendants as to the sufficiency of this evidence other than it was not entered as a sale in plaintiff's sales account. Moreover, no proper objection or

exception was taken to it during trial or saved for review by this court by proper assignment of error.

Appellants proceed upon the theory that the sales account (Plaintiff's Exhibit 8) does not reflect the entire amount received by him from *sales* of asparagus, because the account does not include the amount paid by the railroad company for damages to shipments. Plainly this item does not constitute a sale of asparagus, but damages for injuries to asparagus shipments; there is no pretense by appellants that any asparagus was sold the railroad company, and the items of course would have no place in the sales account. Nor was it necessary that the sales account as prepared by appellee from the sales reports of agents should set forth the gross sales price, or gross market price, or the specified grade of asparagus sold. There was no claim during the trial of the case that the net amount received by appellee from the sale of the asparagus was incorrect, or that the damages are to be calculated from the gross sales price, rather than the net sales price, hence it was sufficient that the account covered the net sales price from which the damages could be readily calculated by the jury. It will be observed the sales account of appellee sets forth the date of shipment; the car number; the character of the asparagus, whether loose or bunched in crates; the net return and the date thereof. The number of crates sold was 15,161, the net total amount received for the sale of said asparagus was $22,547.85, and the amount of damages paid by the railroad was $100.00 as found by the jury. The amount which appellee would have received from appellant for 15,161

crates at $2.00 per crate had they performed their contract is $30,322.00 and the difference between the amount for which appellee sold the asparagus plus the railroad claim paid and $30,322.00 would give the amount of damages suffered by appellee. The point of shipment in either case was Isleton where the asparagus was grown, and the contract of sale to appellants was f. o. b. Isleton.

It is next asserted that the sales account is hearsay and not a permanent record. All books of account and transactions out of court are hearsay. They are admissible under an exception to the hearsay rule when a proper foundation is laid. This rule is too elementary to require citation of authority and the proper foundation was laid to the effect that the entries were made at or near the time of the transaction they record; it is a book of original entries and regularly kept in the regular course of business.

In *Landis v. Turner,* 14 Cal. 573, a book in which entries were made from a slate was held to be a book of original entry and admissible in the evidence.

In *Idol v. San Francisco Construction Co.,* 1 Cal. App. 92, 94, entries from way bills were held to be original entries.

In *Storm & Butts v. Lipscomb,* 117 Cal. App. 6 at page 19, it was said:

> "These daily reports were admitted into evidence over the objection of the defendant, the objections going principally to those portions thereof as are based on information obtained by the witness from the foreman on the work at the

time when he was not there. The foreman kept this data for Smith, the timekeeper, under his direction. These memorandums and time sheets were made up daily. It clearly appears that the records made up from the memorandums in the manner stated, would constitute original records."

See also:

Patrick v. Tetzlaff, 46 Cal. App. 243;

Sugar Loaf O. & S. Co. v. Skewes, 47 Cal. App. 470.

And, in this regard, Section 1947 *Code of Civil Procedure* provides:

"Copies of entries also allowed. When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals."

Under the provisions of this section of the Code it will be noted that the sales account and the entries in the cash book by the bookkeeper of appellee may both be regarded as original entries.

And while the entries made by appellee in his sales account are permanent records, it will be noted that in *Storms & Butts v. Lipscomb*, supra, at pages 19 and 20, the entries may be either original or constitute a permanent record to be admissible in the evidence.

Nothing can be accomplished by an analysis of the authorities cited and quoted by appellants on this subject. It is sufficient to say they have no application. As an illustration in *Tipps v. Landers*, 182 Cal. 771, cited and quoted by appellants, the evidence

plainly shows the book was not a record in the regular course of business. The entries were shown to be not only incorrect but that pages were missing and was otherwise highly untrustworthy. There is no pretense that any such objections could be made against the probative value of appellee's sales account.

It is next contended that the sales account of appellee was not prepared from data and figures within his knowledge. The data upon which appellee's sales account was based consisted of sales reports made in the regular course of business by the agent or agents employed by appellee whose duty it was to make such reports and which reports were compiled by such sales agents at the time of the sales transactions. The sales reports having been made under the circumstances just enumerated, the sales account of appellee is admissible in the evidence as proof of its contents. Any other rule would impose such a hardship on business as would defeat its ends. Surely, appellee is not expected to secure the testimony of each of his Eastern sales agents when business experience has shown reports of the character indicated to be trustworthy when done in the regular course of business.

In this regard it was said in *Patrick v. Tetzlaff*, 46 Cal. App. 43, at pages 245 and 246:

> "It would be to impose a most difficult rule upon the commercial world to hold that, notwithstanding ample proof as to the original character and regularity of the keeping of accounts, there must be in addition an affirmative oath on the part of the tradesman or shopkeeper producing them that they are absolutely correct. In large

> establishments employing a great multitude of clerks this proof would be in many cases beyond reach."

In this case shop cards were kept by employees in the regular course of business covering services rendered and materials furnished in an automobile repair shop. They were held admissible in the evidence as prima facie evidence without further testimony as to their accuracy.

In *Sugarloaf O. & G. Assn. v. Skewes,* 47 Cal. App. 470, cited by appellants, entries in a ledger made by the witness and taken from sales accounts covering sales of oranges by auction by Eastern representatives in Cleveland, New York and Boston were admitted in evidence. In this connection the court said on page 473:

> "Having been received by the plaintiff in the usual course of business, they constituted a reasonable basis of authority to the plaintiff to pay out the balance charged to it on the loss incurred by the sales and to charge to the defendant the amount so paid out by plaintiff for his account. Considered in this light, the ledger entry itself may be regarded as the original entry of the account of the plaintiff against the defendant."

The ledger in this case as one of original entry cannot be differentiated from the sales account kept by appellee, both of which were based upon sales reports from Eastern representatives or agents. The fact that these sales reports were made in the regular course of business was held sufficiently trustworthy.

The case therefore is clear authority for the introduction of appellee's sales accounts in the evidence as proof of its contents.

Chan Kiu Sing v. Gordon, 171 Cal. 28;
Storm & Butts v. Lipscomb, supra, at pages 18 and 19;
Shields v. Rancho Buena Ventura, 187 Cal. 569;
Roseville etc. v. Daniel (Ky.), 91 S. W. 691.

Again, appellee checked the gross sales prices of the asparagus sold as shown by the sales reports of his agents as against the daily report of asparagus sales as to price, grade and place sold with the daily bulletins of the "Federal Market Service" of the United States Government, and found the prices his agents secured were in line with those shown by the government market reports. (R. 151-154, 167.)

(b) Appellee's sales account (Plaintiff's Exhibit 8) is admissible in the evidence as proof of its contents as an itemized summary by express statutory permission.

Section 1855, Subdivision 5, of the *Code of Civil Procedure of California* provides:

> "Contents of Writing, How Proved. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:
>
> * * * * * * *
>
> "5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

In *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, at page 189:

> "The claim is made that it was error for the court to permit the witness Bell to summarize the testimony as to oils purchased by defendant from other parties and the additional cost to plaintiff. No reason is given as to why it was error, and we do not perceive any. The jury were not required, nor was the court required, to make calculations involving many additions and subtractions in figures. The course pursued was the proper one. (Code Civ. Proc. sec. 1855 subd. 5; Greenleaf on Evidence, 16th ed. sec. 563h, and cases cited.)"

Again, in *Globe Mfg. Co. v. Harvey*, 185 Cal. 255, at page 261:

> "No question was raised as to the reasonableness of these charges.
>
> (3) An itemized summary of the expenditures of defendant under the contract was admitted in evidence under the issue of damages. Plaintiff assigns this as error, for the reason that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under subdivision 5 of section 1855 of the Code of Civil Procedure, because the original consisted of 'numerous accounts or other documents which cannot be examined by the court without great loss of time'. Defendant maintains a card system of bookkeeping and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills which he retained and which he knew had been paid."

See:

McPherson v. Milling Co., 44 Cal. App. 491, 495;

People v. Kawano, 38 Cal. App. 612, 614;

Shea v. Sewage & Water Board (La.), 50 So. 166.

If the court will examine the sales account of appellee it will be found to be made up of numerous items constituting individual sales made by some 15 or 16 agents. Each of these sales is represented by a sales report containing the grade of asparagus sold and the gross sales price and the deduction for freight, sometimes cartage, frequently commissions, etc. (R. 136), presenting a proper case for a summary.

The sales reports of appellee's agents were available; the appellee kept them as permanent records, yet no demand was made for them by appellants upon which to cross-examine appellee. No charge was made that these sales reports or the sales accounts prepared by appellee were incorrect. The sole charges were that appellee's sales accounts constituted hearsay, and was not a permanent record.

(c) There was competent evidence in the record showing the grade and market price of the asparagus sold by appellants' agents.

We have already shown that appellee's sales account was admissible in the evidence as a record of original or permanent entries or as a summary of the transactions, and that if appellants had desired the sales report showing the gross market sale prices and the

grade sold they had to but ask for them. Having failed to do so they cannot now object on appeal.

It is asserted that the trial court committed error in admitting in evidence the "Federal Market News" over the objections and exception of appellants upon the ground that they had not been certified by the United States Department of Agriculture. These were daily bulletins issued by the "Federal-State Market News Service"; United States Department of Agriculture, Bureau of Agricultural Economics, showing reports from important markets of daily sales of asparagus to jobbers shipped from California. (R. 167.) During the period appellee shipped asparagus he received these bulletins daily and as he received the sales reports from his agents he compared them with these bulletins to see if his agents were getting the proper prices (R. 151), and the prices they were receiving he found to be in line with those shown by these bulletins. (R. 153.)

Section 661 of 28 *U. S. C. A.*, cited, requiring the authentication of certain government documents for purposes of proof, plainly has no application to this market service. Like other market reports, in trade journals, or newspapers, which by their very nature are of necessity based upon hearsay, are admissible under an exception to the rule, where they have been accepted as reliable.

Thus in 22 *Corpus Juris* page 929, Section 1135-d, it was said:

> "Market quotations. Prices current, and reports of the state of the market published in the

newspapers or otherwise in general circulation and relied on by the commercial world are held admissible on an issue as to value."

See also:

22 *Corpus Juris* page 188, Section 152-ee;
The Blandon, 35 Fed. (2d) 933;
Rice v. Eisner, 16 Fed. (2d) 359, 361;
United States v. Mid Continent Corp., 67 Fed. (2d) 37.

The fact that the Federal Market Reports as to the gross market prices of the various grades of asparagus sold in the vicinity where the asparagus of the appellee were sold were as appellee stated in line with the prices received by his agents, the sales reports of such agents upon which the sales account of appellee were based are conclusively shown to be trustworthy and dependable. Indeed, it is tantamount to a foundation at least as reliable if not more so than if the Eastern agents had taken the stand and sworn to their accuracy.

In conclusion appellee respectfully submits that the verdict and judgment are consonant with principles of equity and justice and should remain undisturbed.

Dated, San Francisco,
June 14, 1937.

DINKELSPIEL & DINKELSPIEL,
Attorneys for Appellee.